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No. 85-1690

UNITED STATES SUPREME COURT

October Term, 1985

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GOODYEAR FARMS, an Arizona corporation; LITCHFIELD PARK PROPERTIES, an Arizona corporation; and LITCHFIELD PARK SERVICE, an Arizona corporation,
Appellants,

v.

THE CITY OF AVONDALE,
a municipal corporation,
Appellee,

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On appeal from the
Supreme Court of the
State of Arizona

# THE STATE OF ARIZONA'S MOTION TO DISMISS OR AFFIRM

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THE CITY OF AVONDALE,
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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, the State of Arizona moves that this appeal be dismissed or, alternatively, affirmed for the following reasons:

1. The appellants, as property owners, lack standing to claim that Arizona's former annexation statute unconstitutionally discriminated against non-property owners; and

2. This appeal does not present a substantial federal question because:

a. Since the filing of this appeal, the challenged statute has been significantly amended, and entirely new procedures will govern future annexations within the state; and

b. The former procedures were plainly constitutional and have been upheld by this and other federal courts that have reviewed similar annexation statutes.

## ARGUMENT

### I

### THE APPELLANTS LACK STANDING

The appellants are owners of real property located in a territory that was annexed by the appellee, City of Avondale. They appeal the annexation, claiming that the statutory procedures uncon-

stitutionally discriminated against non-property owners.[1] Being property owners, however, the appellants lack standing to make this constitutional attack.

It is well settled that "[a]s a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations." County Court of Ulster County v. Allen, 442 U.S. 140, 155 (1979); accord, Rosario v. Rockefeller, 410 U.S. 752, 759, n.9 (1973)

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1. They also attack the fact that the statute weighted the petitioning process according to the assessed value of the property. It is unclear whether the appellants have standing to assert even this narrower claim. In any event, the amendment of the statute on this very point renders further consideration of the issue inappropriate. See section II.a. infra.

(Petitioners lacked standing to attack the residency requirement in a voting law since "[t]he petitioners cannot represent a class to which they do not belong"); and Warth v. Seldin, 422 U.S. 490, 509 (1975) (respecting the "prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief for injury to themselves").

The present appeal falls squarely within the above standing principles. First, only a hypothetical case is presented, since there is nothing in the record which indicates that any non-property owners resided in the affected region. Second, even if there were non-owners, the appellants would not be the proper parties to assert the equal protection rights of such third parties. None of the limited, jus tertii exceptions is applicable here: There is no

statute which confers standing,[2] the appellants bear no special relationship to the non-property owners, and there is no reason why the non-property owners cannot assert their own rights, if they so choose. See Warth v. Seldin, supra at 509-510. Indeed, this case presents the very danger that the Court noted in Singleton v. Wulff, 428 U.S. 106 (1976):

> [T]hird parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the extent they will be bound by the courts' decisions under the doctrine of stare decisis.

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2. Appellants' Jurisdictional Statement implies that Arizona law confers standing (page 9). However, it is this Court's standing requirements--and not those of the state--that necessarily control. Tileston v. Ulman, 318 U.S. 44 (1943); see also Bateman v. Arizona, 429 U.S. 1302 (1976). Moreover, when the Arizona Supreme Court reached the merits, it expressly sidestepped the issue of standing. See footnote 1 of the opinion.

428 U.S. at 114. The appellants in this case are members of the class favored under the statute; plainly, they are not the appropriate parties to advocate the rights of those allegedly disfavored.

II

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

A. The Statute has been amended

Shortly after this appeal was taken, Ariz. Rev. Stat. § 9-741 was significantly amended by the Arizona Legislature. The new and present version of the statute is set forth in the appendix to this motion. Although the petitioning right remains limited to property owners, its role in the annexation process has been altered. Entirely new provisions govern how the annexation process is initiated, how public input is to be accommodated, and how the majority of petitioners is to be determined. Since the

new procedures will apply to certain pending, and all future, annexations, a ruling on Arizona's former statute can have only a limited and isolated impact. Accordingly, the instant case does not present a substantial federal question that warrants the expenditure of the Court's limited resources. See Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1954) (Court dismissed writ of certiorari where adoption of new statute meant that the case would affect only the parties and therefore have only narrow, "episodic" value).

B. Appellants' Equal Protection Arguments Are Without Merit

Under Arizona's former law, the annexation process was triggered when a majority of property owners petitioned a city or town for inclusion within the corporate borders. Ariz. Rev. Stat. § 9-

741.[1/] The statute did not permit any person--property owner or otherwise--to vote on the issue of annexation. Instead, it left the annexation decision to the sole discretion of the governing body of the city or town. See City of Tucson v. Garrett, 77 Ariz. 73, 77, 267 P.2d 717, 719 (1954) ("The petitioners are mere supplicants and have no legal rights to require annexation under any condition").

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3. The pertinent statutory language reads as follows:

> 9-471. Annexation by petition
>
> A. A city or town may extend and increase its corporate limits in the following manner:
>
> 1. On presentation of a petition in writing by the owners of not less than one-half in value of the real and personal property as would be subject to taxation by the city or town in the event of annexation, in any territory contiguous to the city or town, as shown by the last assessment of the property, and not embraced within the city or town limits, the governing body of the city or town may, by ordinance, annex the territory to such city or town.

Similar annexation procedures have been repeatedly upheld against equal protection challenges by both federal and state courts.

First, it is well settled that there is no constitutional right to vote or otherwise participate in annexation decisions. The issue of municipal boundaries is a political matter within the exclusive control of the state. The state can create, modify or abolish boundaries at will, or it can delegate those powers to cities and towns. As stated by this Court in Hunter v. City of Pittsburgh, 207 U.S. 161, 178-179 (1907):

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them . . . . The state, therefore, at its pleasure, may modify or withdraw all such powers, may . . . expand or contract the territorial area, unite the whole or part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, con-

> ditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.

Although Hunter predates the voting rights cases relied on by appellants, it retains full validity in non-voting, annexation contexts. See, e.g. Holt Civic Club v. City of Tuscaloos, 439 U.S. 60, 71 (1978) (where the Court quoted from Hunter and observed that "the case continues to have substantial constitutional

significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them"). Accord, Adams v. City of Colorado Springs, 308 F.Supp. 1397, 1404 (D.Colo. 1970), affirmed, 399 U.S. 901 ("In upholding this [annexation] statute we are, of course, mindful that the Supreme Court's decision in Hunter v. City of Pittsburgh, supra, continues to be the law, and we are not at liberty to limit the effect of this decision by grafting the voting rights decisions on this annexation body of law"). See also Carlyn v. City of Akron, 726 F.2d 287, 288 (6th Cir. 1984), Berry v. Bourne, 588 F.2d 422 (4th Cir. 1978), and Township of Jefferson v. City of West Carrollton, 517 F.Supp. 417, 419 (S.D. Ohio 1981), affirmed, 718 F.2d 1099 (6th Cir. 1983) (all upholding annexation statutes on the authority of Hunter).

Second, it is not unconstitutional to restrict the petitioning process to property owners. Adams v. City of Colorado Springs, supra. Indeed, every discovered federal decision has found this common statutory arrangment to be constitutional. See, e.g., Berry v. Bourne, supra, where the Fourth Circuit reasoned:

> It is true that three-fourths of the freeholders in the area to be annexed must request annexation before the governing body of the annexing city may consider annexation. This is a common preliminary prerequisite for authorization of annexation, whether by an election or by action of the annexing city's governing board. But the important fact is that the action of the freeholders in signing the request for annexation does not authorize annexation. Annexation depends wholly on the favorable vote of the governing body of the annexing city. This is the crucial action and on that neither freeholders nor electors as such have a vote. Since the electors of the municipality of the area to be annexed are not given the right to vote under the challenged statute, the application of the statute poses no equal protection issue.

Id. at 424. Accord, Carlyn v. City of Akron, supra; Township of Jefferson v. City of West Carrollton, supra. State court decisions are also in accord. See, e.g., Doenges v. City of Salt Lake City, 614 P.2d 1237, 1239 (Utah 1980) ("The annexation procedures frequently put special burdens on real property owners. State Legislatures have been permitted to force these interests into focus at the petitioning stage"); and Torres v. Village of Capitan, 92 N.M. 64, 582 P.2d 1277 (1978).[4/]

Third, the decision of the Arizona Supreme Court articulates many legitimate reasons for the property-owner distinc-

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4. Only where elections are authorized have property-owner distinctions been struck down. See, e.g., Hayward v. Clay, 573 F.2d 187 (4th Cir. 1978), cert. denied, 439 U.S. 959; City of Seattle v. State, 103 Wash.2d 663, 694 P.2d 641 (1985) (distinguishing the situation from petition procedures); and Curtis v. Board of Supervisors, 7 Cal.3d 942, 501 P.2d 537, 104 Cal.Rptr. 297 (1972).

tion challenged here. (See Opinion at pp. 13-14.) Apart from the disproportionate financial burdens that affect property owners upon annexation, practical political needs are served by restricting the initial petitioning process to a narrower group. The latter factor was expressly found to be a sufficient rational basis to sustain the classification in Adams v. City of Colorado Springs, supra at 1404, a decision that was subsequently affirmed by this Court. See also Torres v. Village of Capitan, supra at 70, 582 P.2d at 1283.

Finally, appellants' ancillary attack on the use of assessed property values to determine the petitioning majority fails for the same reasons outlined above. The petitioning right is not a voting right, and appellants' election cases are again inapplicable. Similarly, the rational considerations which justify the

roperty-owner distinction, justify the eighting as well.

In short, there is simply no authority to support appellants' equal protection arguments, and the same arguments ave been rejected by this and other ourts on multiple occasions.

. . .

## CONCLUSION

Because the appellants lack standing to bring this consitutional challenge, and because the case does not present a substantial federal question, the State of Arizona requests that the appeal be dismissed or affirmed.

Respectfully submitted,

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# A P P E N D I X

.471. Annexation of territory; procedures; notice; petitions; access to information; restrictions

A. The following procedures are equired to extend and increase the corrate limits of a city or town by annexion:

1. A city or town shall file in e office of the county recorder of the unty in which the annexation is prosed a blank petition required by paraaph 4 of this subsection setting forth description and an accurate map of all e exterior boundaries of the territory ntiguous to the city or town proposed be annexed. If state land is included the territory, written approval of the ate land commissioner and the selection ard established by section 37-202 shall so be filed.

2. Signatures on petitions filed r annexation shall not be obtained for waiting period of thirty days after ling the blank petition.

3. After filing the blank petition rsuant to paragraph 1 of this subsecon, the governing body of the city or wn shall hold a public hearing within e thirty day waiting period to discuss e annexation proposal. The public aring shall be held in accordance with e provisions of Title 38, Chapter 3, ticle 3.1, except that, notwithstanding e provisions of section 38-431.02, subctions C and D, the following notices the public hearing to discuss the anxation proposal shall be given at least x days before the hearing:

(a) Publication at least once in a ewspaper of general circulation, which s published or circulated in the city or own and the territory proposed to be an- exed, at least fifteen days before the nd of the waiting period.

(b) Posting in at least three con- picuous public places in the territory roposed to be annexed.

(c) Notice by first class mail sent o the chairman of the board of supervi- ors of the county in which the territory roposed to be annexed is located.

(d) Notice by first class mail with n accurate map of the territory proposed o be annexed sent to each owner of the eal and personal property as shown on he list furnished pursuant to subsection of this section that would be subject o taxation by the city or town in the vent of annexation in the territory pro- osed to be annexed.

4. Within one year after the last ay of the thirty day waiting period a etition in writing signed by the owners f one-half or more in value of the real nd personal property and more than one- alf of the persons owning real and per- onal property that would be subject to axation by the city or town in the event f annexation, as shown by the last as- essment of the property may be circu- ated and filed in the office of the ounty recorder.

5. No alterations increasing or educing the territory sought to be an- exed shall be made after a petition has en signed by a property owner.

6. The county recorder shall not accept a filing for annexation of any part of the same territory for which a filing for annexation has already been made pursuant to paragraph 4 of this subsection.

B. All information contained in the filings, the notices, the petition, maps and property rolls and other matters regarding a proposed or final annexation shall be made available by the appropriate official for public inspection during regular office hours.

C. Any city or town, the attorney general, the county attorney, or any other interested party may upon verified petition move to question the validity of the annexation for failure to comply with the provisions of subsection A of this section. The petition shall set forth the manner in which it is alleged the annexation procedure was not in compliance with the provisions of subsection A of this section and shall be filed within thirty days after adoption of the ordinance annexing the territory by the governing body of the city or town and not otherwise. The burden of proof shall be upon the petitioner to prove the material allegations of his verified petition. No action shall be brought to question the validity of an annexation ordinance unless brought within the time and for the reasons provided in this subsection. All hearings provided by this section and all appeals therefrom shall be preferred and heard and determined in preference to all other civil matters, except election actions. In the event more than one petition questioning the validity of an annexation ordinance is filed, all such petitions shall be consolidated for hear-

g. If two or more cities or towns show e court that they have demonstrated an tive interest in annexing any or all of e area proposed for annexation, the urt shall consider any oral or written reements or understandings between or ong the cities and towns in making its termination pursuant to this subsection.

D. The annexation shall become fi- l after the expiration of thirty days om the adoption of the ordinance annex- g the territory by the city or town verning body, provided the annexation dinance has been finally adopted in ac- rdance with procedures established by atute, charter provisions, or local or- nances, whichever is applicable, sub- ct to the review of the court to deter- ne the validity thereof if petitions in jection have been filed.

E. For the purpose of determining e sufficiency of the percentage of the lue of property under this section, ch values of property shall be deter- ned as follows:

1. In the case of property as- ssed by the county assessor, values all be the same as shown by the last sessment of the property.

2. In the case of property valued the department of revenue, values all be appraised by the department in e manner provided by law for municipal sessment purposes.

F. For the purpose of determining e sufficiency of the percentage of per- ns owning property under this section, e number of persons owning property all be determined as follows:

1. In the case of property assessed by the county assessor, the number of persons owning property shall be as shown on the last assessment of the property.

2. In the case of property valued by the department of revenue, the number of persons owning property shall be as shown on the last valuation of the property.

3. If an undivided parcel of property is owned by multiple owners, such owners shall be deemed as one owner for the purposes of this section.

4. If a person owns multiple parcels of property, such owner shall be deemed as one owner for the purposes of this section.

G. The county assessor and the department of revenue, respectively, shall furnish to the city or town proposing an annexation within thirty days after a request therefor a statement in writing showing the owner, the address of each owner and the appraisal and assessment of all such property.

H. Territory is not contiguous for the purposes of subsection A, paragraph 1 of this section unless:

1. It adjoins the exterior boundary of the annexing city or town for at least three hundred feet.

2. It is, at all points, at least two hundred feet in width, exclusive of highways.

3. The distance from the existing boundary of the annexing city or town where it adjoins the annexed territory to the furthest point of the annexed territory from such boundary is no more than twice the width of the annexed territory.

I. A city or town shall not annex territory if as a result of such annexation unincorporated territory is completely surrounded by the annexing city or town.

J. Notwithstanding any provisions of this article to the contrary, any town incorporated prior to 1950 which had a population of less than two thousand persons by the 1970 census and which is bordered on at least three sides by Indian lands may annex by ordinance territory owned by the state within the same county for a new townsite which is not contiguous to the existing boundaries of the town.

K. The provisions of subsections H and I of this section shall not apply to territory which is surrounded by the same city or town or which is bordered by the same city or town on at least three sides.

L. A city or town annexing an area shall adopt zoning classifications which permit densities and uses no greater than those permitted by the county immediately before annexation. Subsequent changes in zoning of the annexed territory shall be made according to existing procedures established by the city or town for the rezoning of land.

M. The annexation of territory within six miles of territory included in any pending incorporation petition filed

with the county recorder pursuant to section 9-101.01, subsection C shall not cause an urbanized area to exist pursuant to section 9-101.01 which did not exist prior to the annexation.

The new statutory procedures were adopted with the following applicability and emergency clauses:

Section 8. Applicability; expiration

A. Section 9-471, Arizona Revised Statutes, as amended by this act, applies to any annexation process which begins after the effective date of this act.

B. Except as provided in subsection C or D of this section, any annexation process which began before the effective date of this act but which did not become final before the effective date of this act for any reason, including the application of the moratoriums of Laws 1985, chapter 3 or 10, is null and void. Any attempt to reinstitute such an annexation is subject to section 9-471, Arizona Revised Statutes, as amended by this act.

C. This act except for the provisions of section 4 does not affect the validity of any annexation ordinance passed before the effective date of this act and finally determined to be valid by a court of competent jurisdiction before or after the effective date of this act. This act does not affect the validity of any annexation ordinance passed in accordance with applicable law after March 13, 1985 and before the effective date of this act

ich becomes final on or after the effec-
ve date of this act.

D. This act does not affect the va-
dity of any annexation by a city or town
a county having a population in excess
two hundred fifty thousand persons ac-
rding to the 1980 United States decenni-
census if the annexation is pursuant to
petition circulated after March 13, 1985
d signed by seventy-five per cent of the
al property owners in the territory pro-
sed to be annexed, including the state
nd commissioner if state lands are in-
uded and if the annexation ordinance is
ssed before June 1, 1986.

Section 9. Emergency

To preserve the public peace, health
d safety it is necessary that this act
come immediately operative. It is
erefore declared to be an emergency mea-
re, to take effect as provided by law.

pproved by the Governor - April 10, 1986

iled in the Office of the Secretary of
tate - April 10, 1986